EB-2005-0523

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998 S.O. 1998, C.15, Schedule B;

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to make certain determinations respecting conservation and demand management ("CDM") by Local Distribution Companies ("LDC") activities as described in the Electric Distribution Rates ("EDR") Handbook and Total Resource Cost ("TRC") Guide pursuant to subsection 19(4) and 78 of the Ontario Energy Board Act, 1998.

--- This is the Cross-Examination of DAVID WESLEY HEENEY, on his affidavit sworn December 2, 2005 herein, taken at the offices of Shibley Righton LLP, 250 University Avenue, Suite 700, Toronto, Ontario, M5H 3E5, on Friday, the 9th day of December, 2005.

APPEARANCES:

Jay Shephard For School Energy Coalition

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--- Upon commencing at 2:30 p.m.

DAVID WESLEY HEENEY: Affirmed

EXAMINATION BY MR. SHEPHARD:

1. Q. Mr. Heeney, I'm looking at an affidavit dated December 2nd entitled Affidavit of David Heeney. This is your affidavit?

A. It is.

2. Q. And attached to it is a report that's entitled DSM Free Riders and Attribution of Benefits.

A. Actually, CDM Free Riders and Attribution of Benefits.

3. Q. I'm sorry, CDM Free Riders and Attribution of Benefits. And that is your work?

A. Yes, it is.

4. Q. So I actually just have a few questions of you. First, I'm looking at page 5 of the report which is Exhibit A to your affidavit and in answer to the board's first question, you say -- the question is should the board order LDCs to spend more money. Your answer is yes. If they don't have enough in low income programs, then the board should order them to spend more on low income programs. Is that a fair paraphrase of what you are saying?

A. Except that there's a qualifier, that there may be special circumstances where they have reason not to have low income programs.

5. Q. Okay. Understood. Would you say that the same principle applies to other identifiable sectors within LDCs, and of course the one near and dear to my heart is schools? If they don't have any program for schools and there's an opportunity there, is it appropriate for the board to order them to put money in their budget, extra money for schools?

A. Well, I think there's an important distinction between schools and low income in that low income customers and other hard to reach customers were specifically identified in the Minister's letter of May 31st, 2004, as areas that the LDCs ought to consider. So they've had now a year-and-a-half to consider low income -- programs for low income customers and there's no specific mention of schools in the Minister's letter. So as a matter of policy, it would appear that the Minister has specifically focussed on low income customers as being distinct from other types of customers.

6. Q. So if the board, let's say -- let's take Toronto Hydro as an example, there are 900 schools in the Toronto Hydro area so it's a good example. So let's say Toronto Hydro comes in and they have nothing in their budget for schools, their conservation budget for schools, you are saying it is not appropriate for the board to say

to them, we think that 900 schools, you should have some money in for schools, add $2 million, whatever? It's not appropriate for the board to do that?

A. I believe it's appropriate for the board to ask the question of how the programs were selected and that why, if there are particular areas where there aren't programs, why there are not programs in that area, and then to assess the appropriateness of the response given by the proponents.

7. Q. Okay. So the board could say, and again I'm just using schools as an example because I think it could apply to hospitals too.

A. I understand the reason why you are using schools as an example.

8. Q. It's such a great example. So the board should be asking the question, why are there no programs for this group, and assess the answers from the utility, and if the board is not satisfied that they have a good reason for excluding them, then the board should say, well, we think you should have programs and we think you should spend X dollars on it; is that fair?

A. For the first part, I would certainly agree. I think it's appropriate for the board to ask those questions if they wish to and I think it's appropriate for them to say, well, we don't really like

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the answer that you've given. The second part is a little more difficult for them to say you should spend $5 million, for example, on schools. I'm not sure how the board would make that determination. And it may be difficult for the utility to then meet all of the other criteria that the board has set out, meeting TRC guide and so on and so on, and commit to a specific level of funding.

9. Q. So it may be more appropriate for the board, in the case of those sorts of rate payers, to say to the utility, we don't like your answer, so we want you to go back and analyze what you can do for that sector and give us evidence so that we can assess whether it's the appropriate way to do it.

A. I think that would be more reasonable than to specifically dictate a number without some better basis for saying that. Now, it's possible that the board might have done their own independent study and...

10. Q. Or it's possible that other interveners could come in with evidence.

A. Yes. I mean, the difficulty is of course that the utility is the one who is on the hook for it and it has to demonstrate that there's a positive TRC and so on and so on and so...

11. Q. But that's true of low income programs

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too.

A. Yes, it is.

12. Q. But you think it's appropriate for people like LIEN and VECC to come in with evidence saying you should be doing these things or these types of things, utility, and the board should order you to do it, right?

A. Yes. And I think that there's that qualifier again that I referred to, and if they say we've investigated the market and we believe that in the case of some communities, there are no low income customers in our franchise area or we have other programs and we've assessed their applicability to low income customers, for example, and they are appropriate for them and meet the needs that they have or some other reason that they might have, they cannot deliver programs and meet the TRC criteria, I don't know what all of the possibilities are for why they might not have low income programs or low income programs to the level that the board might a priori expect them to have or interveners, and then the board is in a position having to judge whether or not those reasons are adequate.

13. Q. And if they are not, the board is in a position to say those reasons aren't adequate and you should do this, this and this, right?

A. Depending on what this, this and this is, yes, they are. And I think -- I can imagine a situation where they said, we cannot deliver cost-effective programs and the board says, well, we think that you can and then -- it's a tricky situation. I'm not sure I know the answer offhand of how you resolve that.

14. Q. It sounds like what you are saying is that the board sort of has the hammer, if you like, to order the utility to do something, but it would be better generally if the board expresses its desire that the utility do more and have the utility then initiate better programs in that area.

A. That would certainly be preferable, yes.

15. Q. So use persuasion with the hammer in the background as it were?

A. A prod perhaps rather than a hammer.

16. Q. Okay. Thank you very much. Off the record.

--- Off-the-record discussion?

BY MR. SHEPHARD:

17. Q. Let me turn to free ridership. Now, I'm showing you a report that is entitled Improvements to the DSM Incentive Recommendation for Enbridge Gas Distribution, and will you confirm that you are one of the authors of that?

A. Yes, I am.
18. Q. And this was filed in the Enbridge 2003 rate case; is that correct?
A. That's correct.
MR. SHEPHARD: And I'm marking that as Exhibit 1 to your examination.
EXHIBIT NO. 1: Document entitled Improvements to the DSM Incentive Recommendation for Enbridge Gas Distribution.
BY MR. SHEPHARD:
19. Q. And you were a co-author of this with Todd Williams?
A. Yes.
20. Q. And Judy Simon?
A. That's right.
21. Q. You heard my questions of Mr. Williams on this?
A. Yes, I did.
22. Q. It's correct, isn't it, that part of the basis of your recommendations in this, the foundation, is that you think it's appropriate to lock in the calculation of TRC for most parameters.
A. Yes.
23. Q. And that the only two that shouldn't be locked in are participants and program costs.

A. I believe that's correct, yes.

24. Q. So, for example, measure lives should be locked in, avoided gas costs should be locked in.

A. Yes.

25. Q. Free ridership.

A. Yes.

26. Q. Savings per measure.

A. Yes.

27. Q. I can't remember the list but anyway. Okay. Attribution should be locked in.

A. Yes.

28. Q. And the reason for that is to give certainty to the utility.

A. That's correct.

29. Q. So that they could focus on the things that they can control.

A. Exactly.

30. Q. All right. And if you turn to page 8 of your report, one of the principles of an SSM that you've set forth is: "The incentives should be based on results achieved for rate payers, not just effort expended." Is that correct?

A. Yes, it says that.

31. Q. And the locking in of the calculation assumptions is not consistent with that, is it?

A. I don't agree with that, no. I think it is consistent. I think what this is referring to is that the incentive should be based on the results, not on effort expended, and that locking in those assumptions does not reward effort expended in the sense that there are incentive mechanisms in other jurisdictions that are a percentage of funding of the program, for example, or that are strictly based on the amount of effort rather than the results, that clearly the incentive that we have in Ontario that is based on TRC is intended to measure the results achieved rather than strictly effort expended.

32. Q. But the way you believe that they should calculate the results achieved doesn't actually produce the real results achieved, right? It produces a calculated proxy for results achieved.

A. Which is based on the best information that was available at the time that the plan was prepared and it was reviewed by the board and by other interveners, yes.

33. Q. And so one of the results is that you can be in a situation where the board orders an SSM payment to a utility knowing that it's rewarding results that didn't actually take place, correct?

A. Yes. And as Mr. Williams pointed out, it's also possible that they could be under-rewarding because the results are -- the calculated results are less than the actual.

34. Q. You've been involved in conservation for many years, right?

A. Yes.

35. Q. I guess the question I would ask you is, isn't there a concern that if you reward results that didn't actually occur, that you undermine the public perception of conservation activities?

A. There's a -- yes, that you would undermine the perception of -- the public perception, particularly if there's not an understanding of the context in which those rewards were determined which is a process that involves not just the proponent but the board as well who oversees the plans and interveners who have an opportunity to oversee the plans, in some cases consultation outside of that official process with experts and members of the public and they all have an opportunity to say we think that this piece of equipment lasts this many years, for example.

Now, if it turns out that all of those people involved in the process learn halfway through the delivery of a program that the piece of equipment lasts longer or a shorter length of time than everyone thought at the beginning of the process, I believe that that should be -- that people would understand that, all right, we learned something here and we went with the best available information we had at the time and going forward, we should correct that information, but that doesn't mean that you are rewarding -- you are not rewarding people specifically for results that didn't occur, you are rewarding them for delivering a program that they delivered according to the best understanding at the time that the program was planned and approved.

36. Q. If you have a salesperson you pay on commission and the salesperson makes the sale, everything is signed and everything like that, and then the purchaser goes bankrupt before the sale could be completed, do you think it's appropriate to pay their commission?

A. Well, I mean, that's part of the contractual relationship, but I understand where you are going and certainly in some circumstances, that would not be appropriate.

37. Q. It's just a risk that you take when you are engaged in that sort of activity, it's just one of the risks, right?

A. In that kind of a business, yes, it is.

38. Q. Okay. But the reason why you don't think that that same principle should apply in the case of the utilities is because you don't think they should take

that sort of risk in the case of conservation, right?

A. I think that undermines their willingness and ability to deliver conservation.

39. Q. Now, they take lots of other risks, exogenous risks, in their -- risks from exogenous factors in their businesses already, right?

A. The LDCs?

40. Q. Yes.

A. Not that many, no.

41. Q. Weather?

A. Well, there are mechanisms for -- it is a risk but they have ways of dealing with that risk, yes.

42. Q. And how do they deal with that risk?

A. I'm not an expert on the whole rate setting process for utilities and how they deal with those risks, but I know that they do have ways of dealing with those risks, yes.

43. Q. And economic conditions, a fast growing economy is going to change their revenue; isn't that right? It's going to change their profit?

A. It could, yes.

44. Q. Inflation?

A. Yes.

45. Q. So they project that, but they don't know whether that's what's going to actually happen, do

they?

A. No.

46. Q. So why are things like free ridership or avoided gas costs, why are they things that they need to be protected from when all these much larger things are things they are not protected from?

A. I think the main reason is that those other things relate to their core business and the things that we are talking about for CDM or DSM are a relatively small part of activities that are not part of their core business in which they are doing because they are rate-regulated activities -- sorry, rate-regulated organizations. And that they would not be engaging in those activities through the rate-regulated company if there was not either a requirement or expectation that they engage in those activities.

47. Q. Is this the sort of conservation's counter-intuitive argument, that their job as a utility is to build low and you are asking them to do something that's essentially contrary to their main goal, and so that you should make it easier on them to do that; have I got that about right?

A. I wouldn't put it that way. I think these are things that are not part of their historic range of activities. They are a relatively small component of their overall expenditures, let's say, if we use that as a surrogate of focus of activity, and in some cases there are disincentives that have to be addressed to them engaging in conservation activities and that's what the SSM and LRAM are intended to address.

48. Q. But part of your thesis here is reduce their risk in this area to make it easier for them to do it because otherwise they might be a little reluctant to do it or less motivated to do it.

A. Yes.

49. Q. Okay. It's true that -- I'm going to leave that. Let me just ask you one question about attribution. We have Mr. Williams saying free ridership and attribution are essentially the same thing, they are just different looks of the same thing, and we have Mr. Brophy saying in his affidavit they are not related concepts. What do you think? And, sorry, we have Mr. Neme saying they are the same thing.

A. Well, they are certainly not the same thing but they are all about how much of the net benefits generated are associated with the actions or initiatives of the LDCs. So in that sense, I would agree that they are the same. But one is -- free rider is referring to participants and attribution is referring to the utility itself as a partner with other entities.

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50. Q. All right. And Mr. Neme has said the easiest way to deal with attribution is simply build it into the free rider rate. Do you agree that that's a good way of doing it?

A. I think they are quite different things and so I think that they ought to be determined independently.

51. Q. Okay. So let me ask you the same question I asked Mr. Williams. If I implement a measure because electricity is expensive and not because the utility asked me to, I'm a free rider, right?

A. Yes.

52. Q. If I implement a measure because --

A. Well, sorry, let me just qualify that. You are a free rider to the extent that you would have done that activity anyway. It's possible that with rising electricity prices, you might become aware of opportunities as a result of the utility's initiative even if you don't participate in, say, an incentive program that they offer. So there's a large environment of changes that are going on, one of which is higher prices, another might be an ad in the paper saying get a $5 coupon. Whether or not you get that $5 coupon, you may -- your decision may have been influenced by the utility. Even if you are not a participant in the program and even if prices had gone up, you might not have been aware of certain opportunities and so on.

53. Q. Understood. The devil is in the details. But the simpler question I'm asking, I think, is if I only did it because prices went up.

A. If you only did it --

54. Q. And I wasn't influenced by the utility.

A. Yes.

55. Q. I'm a free rider.

A. Yes.

56. Q. If I only did it because the federal government sent me a letter saying, We'll give you $1,000 if you do this and I wasn't influenced by the utility, why am I not still a free rider?

A. Well, I suppose one could -- we are kind of arguing semantics here. I would say that that is a free rider. My understanding of the attribution is we are talking about where programs are delivered jointly and so the question is someone participates in the program, how do you attribute the relative share of the benefits to the program participants.

57. Q. Now, your view is that the -- what the guide says, which is 100 percent attribution to the utility, isn't really the appropriate answer, right?

A. I can certainly imagine cases where it is not and Jack Gibbons in his affidavit gives an example where the utility contributes 1 percent and the government, let's say, contributes 99 percent and the utility claims 100 percent of the benefit, in that case I would certainly agree with him that 100 percent attribution of the benefits to the utility is not appropriate and certainly going forward, I could see refinements to what is in the TRC guide.

58. Q. What if -- let's say Toronto Hydro calls up the federal government and says, you know, we are a bigger area, we think you should have a program that does X, Y and Z and they talk them into it. And so sure enough there is a program -- Toronto Hydro doesn't even spend any money, the feds do it all, should they get credit for that? Should they have attribution of that?

A. It's a difficult question but I'm leaning towards yes, that the program would not have existed if not for their actions, their initiative, and they ought to be rewarded for that initiative and the actions that they took, whether or not they did it.

59. Q. Understood. So now we are ten years later, the program is still going on, Toronto Hydro hasn't been involved for ten years, should they still get credit for all the savings coming from that program?

A. That's a tougher argument. My leaning

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is that the share of attribution to which they are entitled ought to be revisited. Offhand, I don't know whether it's zero or 100 percent or some number in between.

60. Q. You are familiar with the problem of incenting market transformation activities, right?

A. Hmm-hmm.

61. Q. Because it's really harder to measure, right?

A. It can be, yes.

62. Q. And so what happens is -- what's been happening more recently in many jurisdictions is that market transformation has separate incentives distinguished from the SSM process, right?

A. There are jurisdictions that do have separate incentives, yes.

63. Q. Is it fair to say that the activities of a utility in promoting other entities to do conservation as opposed to programs of their own, should also have some other way of incenting those activities as opposed to just building them into the SSM? Does that make sense to you? So in the Toronto Hydro federal government example, Toronto Hydro would get an incentive but it wouldn't be as if -- it wouldn't be the same as if it was their program.

A. I certainly don't have a problem of principle with that. If you've seen some of the other evidence that I've presented to the board, I've talked about different kinds of incentive mechanisms and there could be incentive mechanisms that are appropriate and some circumstances that are different from the SSM.

64. Q. Okay. You've suggested a default option in which LDCs don't get 100 percent attribution for things in which they are in partnership, right?

A. That's correct.

65. Q. But they get some sort of premium.

A. And again, that's because they are responding to the policy directive that came from the Minister in his letter of the 31st of May, 2004, encouraging LDCs to leave -- the money that they've spent on CDM.

66. Q. And one of things you've said here is you build some numbers into the TRC guide because that's efficient, right?

A. Yes.

67. Q. But if the LDC wants to spend the money or the time or the effort to come in and show that a different number is correct, they should be entitled to do so.

A. Yes.

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68. Q. Would it also be fair for the rate payers to spend the time and money to show that a different number is correct and prove that a different number is correct?

A. We are talking about at the plan stage here; is that correct?

69. Q. Yes.

A. My understanding is that's the process that we have, yes.

70. Q. Okay. And similarly with free ridership?

A. Yes.

71. Q. So if rate payers came in and said --

A. Well, there's two aspects to the free rider. One is that the board has a process whereby they develop a TRC guide that has free ridership -- free rider numbers in it and they had a process that invited comments on the guide that they -- on a draft guide and anyone was invited to respond to the draft guide and suggest different numbers than were there and the board then revised the guide based on comments generally and finalize the guide. So there is a process whereby interveners and rate payers had an opportunity to comment on those free rider numbers and to make their case to the board.

72. Q. And LDCs as well.

A. And LDCs, yes.

73. Q. But haven't you said that the right answer from an efficiency point of view is use the free rider numbers in the guide unless the LDC wants to come in and say a different number is appropriate, improve it?

A. Well, I think the number in the guide has already gone through a consultation process and the LDC may have additional information or programs -- specific information and specifically we've suggested that the guide be changed for low income programs in particular, if the board decides to keep the guide as it is, which I can certainly see some argument for, I think it's still reasonable for an LDC coming in with a program for low income customers, to argue that the rate -- the rate in the guide is identified in the guide as a default number and the guide invites LDCs to substitute one if they have better information.

74. Q. Okay. So the question I'm asking then is if you agree that the LDC can substitute a different value if they can prove it, why wouldn't rate payers have the same opportunity?

A. I think rate payers would have the same opportunity but I would expect that the board would, if they were going with a number that was in the guide, I would expect that the board to say, well, we've already gone through a process of reviewing that and so they would give greater weight to the numbers that are in the guide, but if an LDC is coming in with an alternative to what is in the guide and rate payers have a different view of that alternative, they don't accept that alternative, then I think the board would weigh that evidence and rule accordingly.

75. Q. You say that if the TRC guide says free riders for program X is 10 percent, the LDC should be free to come in and say, We are doing program X but here is our more detailed data and it shows that the free ridership should be 8 percent, they should be allowed to do that.

A. Yes.

76. Q. In the same situation in which the LDC is doing program X but they are happy with the 10 percent, should the rate payers be able to come in exactly the same way and say, We have additional evidence that for this particular application of program X, it should be 12 percent?

A. At the plan stage, yes.

77. Q. So at the time that the program is being approved?

A. Yes.

78. Q. Okay. So it's symmetrical. As far as you are concerned, the rules should be the same for both

sides.

A. Yes. I'm somewhat -- my concern is that it might be far down the road at the point that the board is reviewing it and certainly for my LDC clients, I would encourage them to talk to, if there were interveners that they knew or were aware of those things, to talk to them earlier on and seek their input on not free riders specifically but all aspects of the design of the program.

79. Q. But, Mr. Heeney, I'm trying to decouple whether you use the guide number and whether it's locked in. So we talked about locking in. That's a different issue. And I understand that of course after the fact you have a view that after the fact you shouldn't be changing the number, right? But I'm asking about the initial number and whether we should be locked to the guide or whether it's simply a matter of the guide is the default, it sort of creates a presumption that number is right and either the LDC or interveners can come in and demonstrate that in this case for this utility, that's not the right number to use.

A. If rate payers have information that the number in the guide is not appropriate for the specific program that is being introduced by the utility, I think it's in the interest of all parties for them to bring that information forward at the earliest possible opportunity, and I think that benefits all parties.

MR. SHEPHARD: Wonderful. That's it. Thank you.

--- Whereupon the proceedings adjourned at 3:07 p.m.

I HEREBY CERTIFY THE FOREGOING
to be a true and accurate
transcription of my shorthand notes
to the best of my skill and ability.

Voula Kirkos, CSR
Computer-Aided Transcription

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